

No. 11644

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMPSON MOTORS, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Jurisdictional Statement.

Appellee filed its complaint against Sampson Motors, Inc. and Lockheed Aircraft Corporation, wherein appellee prayed judgment against Sampson Motors, Inc. in the amount of thirty dollars and twenty cents plus interest at the rate of six per cent per annum from November 2, 1945, which amount was alleged to be the balance due the United States pursuant to a unilateral order signed by the Undersecretary of War determining and fixing the amount of excessive profits realized by the contractor during its fiscal year ended November 30, 1942 in the amount of sixty thousand and no/100 dollars (\$60,000.00), less the applicable tax credit to which Sampson Motors, Inc. is entitled under Section 3806 of the In-

ternal Revenue Code in the amount of forty-two thousand eight hundred twenty-three and 67/100 dollars (\$42,823.67). The complaint prays judgment against Lockheed Aircraft Corporation requiring that it render an account of all moneys that have become due from it to Sampson Motors, Inc. since its receipt of withholding orders alleged to have been issued and that upon said account being stated, defendant Lockheed Aircraft Corporation be required to pay to the plaintiff the amount which it was required by the terms of said withholding orders to withhold for the use of the the United States. After a trial on the merits judgment was entered against Sampson Motors, Inc. in the amount of thirty-two and 61/100 dollars (\$32.61), which amount includes interest on the amount claimed to be due from Sampson Motors, Inc. at the rate of six per cent per annum from November 2, 1945. Judgment was entered in favor of the United States against Lockheed Aircraft Corporation in the sum of seventeen thousand five hundred forty-three and 8/100 dollars (\$17,543.08). Lockheed did not appeal.

Jurisdiction of the District Court is established by Section 24 of the Judicial Code as amended (28 U. S. C. 41), and by the provisions of Section 403(c) of the Re-negotiation Act. Jurisdiction of this court is established by the provisions of 28 U. S. C. 225.

Statement of the Case.

Pursuant to renegotiation, the Undersecretary of War, on July 31, 1944, entered an order determining the amount of excessive profits realized by defendant Sampson Motors, Inc. during its fiscal year ended November 30, 1942, in the amount of sixty thousand dollars (\$60,000.00). [R. 49.] It was stipulated at the trial that Lockheed, in compliance with withholding orders issued to it by the Undersecretary of War, had withheld from amounts otherwise due Sampson Motors, Inc. for the use of the United States, the sum of seventeen thousand five hundred forty-three and 8/100 dollars (\$17,543.08); that appellant Sampson Motors, Inc. had not petitioned the Tax Court of the United States for a redetermination of the amount of excessive profits received by it, as provided by Section 403(e) of the Renegotiation Act, and that the period for filing such petition had expired; that the amount of the tax credit to which Sampson Motors, Inc. is entitled under Section 3806 of the Internal Revenue Code is forty-two thousand eight hundred twenty-three and 67/100 dollars (\$42,823.67) [R. 49-51]; and finally, it was stipulated that if the court should decide the United States is entitled to judgment, the amount of the judgment against Lockheed Aircraft Corporation would be seventeen thousand five hundred forty-three and 8/100 dollars (\$17,543.08), and the amount of the judgment against Sampson Motors, Inc. would be thirty and 20/100 dollars (\$30.20) plus interest at the rate of six per cent per annum from November 2, 1945. [R. 52, 53.]

Summary of Argument.

I.

The Renegotiation Act is constitutional.

II.

The 1942 Act provides for unilateral determination by the Secretary.

III.

Administrative due process may not be considered here. That question is exclusively for the Tax Court.

IV.

The Tax Court has exclusive jurisdiction to finally determine the amount, if any, of excessive profits. In the absence of an application to the Tax Court the determination of the Secretary is final as to the amount.

V.

Interest is allowable as the proper measure for damages for delay in payment.

ARGUMENT.

I.

The Renegotiation Act Is Constitutional.

Appellant's arguments as to the unconstitutionality of the Act constitute a sketchy rehash of points already raised and emphatically overruled by this court in the cases of *Spaulding et al. v. Douglas Aircraft Company, et al.*, 154 F. (2d) 419, and *United States v. Pownall*, 159 F. (2d) 73. The *Spaulding* case and the *Pownall* case were followed in the First and Sixth Circuits in the cases of *Lichter v. U. S.*, 160 F. (2d) 329, and *Alexander Wool Combing Co. v. U. S.*, 160 F. (2d) 103.

II.

The 1942 Act Provides for Unilateral Determination by the Secretary.

Appellant contends that the amendments introduced by the Act of February 25, 1944 (Public Law 235, 78th Cong., 2d Sess.) are effective only with respect to the fiscal years ending after June 30, 1943; and that since the fiscal year here involved ended November 30, 1942, the Secretary lacked authority under the law applicable to renegotiation for the fiscal year in question, to enter a unilateral order determining the amount of excessive profits. This contention presents a question of legislative intent.

By the Act of February 25, 1944 (Public Law 235, 78th Cong., 2d Sess.) (50 App. U. S. C. 1191[e][2]). Congress specifically authorized Tax Court redetermination of unilateral orders of the Secretary made prior to the date of the enactment of said Act. Since Congress authorized review of such orders it must have contem-

plated their issuance. Furthermore, the intent that the Secretary have power to enter a unilateral order determining the amount of excessive profits is made evident upon a consideration of the language of the Act prior to its amendment, in view of the policy and purpose of the Act. It would be idle to establish a system for the recapture of excessive profits, and for the determination of the amount thereof by administrative action, with the intent that the administrative power of the administrative agency be limited to the power to enter into agreements fixing the amount. Such an arrangement would be utterly ineffective if the contractor or subcontractor should refuse to agree.

Without regard to the merits of this contention, it is one which should have been presented to the Tax Court. *Lichter v. U. S.*, 160 F. (2d) 329, 331.

III.

Administrative Due Process May Not Be Considered Here. That Question Is Exclusively for the Tax Court.

Appellant contends that the renegotiation officers did not grant it due process, in that they refused to hear its evidence, refused to reveal their method of computation, and did not give Mr. Brett time enough to go to a hearing in Washington. If it be assumed for the purpose of argument that all these contentions are true, the fact remains that the appellant could have secured due process by petitioning the Tax Court, and having failed to do so, it cannot urge that contention here. *Spaulding v. Douglas, etc. et al.*, 154 F. (2d) 419; *Utléy v. St. Petersburg*, 292 U. S. 106, 109; *Lichter v. U. S.*, 160 F. (2d) 329, 331.

IV.

The Tax Court Has Exclusive Jurisdiction to Finally Determine the Amount, if Any, of Excessive Profits. In the Absence of an Application to the Tax Court the Determination of the Secretary Is Final as to the Amount.

Sub-section (e)(1) of the Act provides:

“Upon such filing such court (the Tax Court) shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or sub-contractor, and such determination shall not be reviewed or redetermined by any court or agency.”

Sub-section (e)(2) contains the same provision with reference to the administrative determinations made prior to the enactment of the Revenue Act of 1943 (Act of February 25, 1944). The constitutional validity of this provision is sustained by the decisions in the *Spaulding*, *Pownall*, *Lichter* and *Alexander* cases and the principle under discussion was applied in *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540, 544. The failure of appellant to petition the Tax Court for a redetermination constitutes an election to abide the Secretary's determination as to the amount. *Lichter v. U. S.*, 160 F. (2d) 329, 331.

V.

Interest Is Allowable as the Proper Measure of Damages for Delay in Payment.

Appellant contends that no interest is allowable on the amount found by renegotiation to be due the United States in the absence of a statutory provision for interest. This precise question was considered by the court for the Southern District of Virginia in the case of *United States v. Strontium Products Company*, 68 Fed. Supp. 886, in which case the court held that interest should be allowed.

When the creditor suing for interest is the United States Government, the question whether interest runs is not controlled by the local rule, statutory or common law, but is a federal question. *Royal Indemnity Company v. United States*, 313 U. S. 289.

In *Billings v. United States*, 232 U. S. 261, the Supreme Court faced the question whether interest ran on unpaid taxes even though the tax statute did not so provide. On pages 284-288 of the opinion will be found an extensive review of the authorities and it was held that interest did run. The court said, page 286:

“Thus, as to the necessity for a statute, it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where, in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young v. Godbe*, 15 Wallace 562-565: * * *

And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of

view of reason and justice, even though no express statute existed for compelling its payment. So also as to the nature and character of the obligation to pay taxes.”

Perhaps an even closer analogy than that of tax liability can be found in the assessment by the Comptroller of the Currency of “double liability” upon stockholders in a national bank. Such liability, like that in renegotiation, is not penal, tortious or a tax. It is, in a broad sense, contractual, but the liability arises and the amount thereof is fixed by the unilateral action of a federal official. The stockholders’ consent to an assessment is not required. The leading case on stockholders’ liability is *Casey v. Galli*, 94 U. S. 673, where the Supreme Court said, page 677:

“The sums to be paid being liquidated and due and payable when the Comptroller’s order is made, it follows that the amount bears interest from the date of the order, otherwise there would be no motive to pay promptly and no equality between those who should pay then and those who should pay at the end of a protracted litigation.”

If Congress has the power to pass the Renegotiation Act, then it also has the power to provide specifically for awards thereunder. It did not do so specifically but such an intent may be gathered from a study of the entire statute, its words and its avowed purpose.

It was clearly the purpose of Congress to hasten collection, thus Section 403(c) authorizes the Government to proceed (A) by reductions in the amounts otherwise payable to the contractor under contracts with the departments, or by other revision of their terms; (B) by with-

holding from amounts otherwise due to the contractor any amount of such excessive profits; (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontract; (D) by recovery from the contractor, through repayment, credit, or suit, any amount of such excessive profits actually paid to him; or (E) by any combination of these methods as is deemed desirable. An arsenal of weapons is thus provided to speed recovery. Section 403(e) authorizes redetermination in the Tax Court but specifies that pendency of such Tax Court proceedings "shall not operate to stay the execution of the order of the board." Finally it is to be noted that Congress has been voting annual appropriations to refund collections of excessive profits whenever it may be ultimately adjudged that too much was collected. Public Law 40, 79th Cong., 1st Sess. Public Law 521, 79th Cong., 2d Sess. Obviously Congress intends that the money be brought into the Treasury promptly to avoid the danger that it may be dissipated and if in the haste, too much is collected, the excess will be refunded.

Since it is the statutory policy to hasten payment it would be contrary to the whole pattern of the Act not to charge interest to a contractor who refuses to pay and retains the use of his money until sued, while other contractors who complied with the spirit of the Act and paid promptly, simply lose the use of their money for cooperation in the war effort.

The subcontracts here involved were entered into and performed in the State of California where the legal rate of interest is 7%. The regulations adopted pursuant to

the Renegotiation Act provide for interest at the rate of six per cent. (See *U. S. v. Strontium Products Company*, 68 Fed. Supp. 886, 888.) While, as has been shown, the question is a federal question and, as pointed out in the *Strontium* case, it is doubtful that the regulation is binding upon the court, nevertheless, as the court in that case said, "It (the regulation) is persuasive and worthy of substantial consideration." In this case interest on the small amount remaining due from appellant at the rate of six per cent per annum was allowed, and it is submitted that this is a reasonable measure of damage for delay in payment.

Respectfully submitted,

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